Nos. 80-847 and 80-1067

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,

Appellants,

v.

HARRISON SCHMITT, *et al.*,

Appellees.

No. 80-1067

FEDERAL ELECTION COMMISSION,

Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OR TO DISMISS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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MOTION TO AFFIRM OR TO DISMISS

Appellees Harrison H. Schmitt, Carl T. Curtis and Americans for Change (hereinafter collectively referred to as "AFC") move the Court to affirm the judgments of the three-judge United States District Court for the District of Columbia in Nos. 80-847 & 80-1067 on the

ground that it is manifest that the questions on which the decision in the case depends are so well-settled as to need no further argument. Alternatively, appellee AFC moves the Court to dismiss the appeal of Common Cause, *et. al*, No. 80-847, on the grounds that 26 U.S.C. §9011(b) does not authorize their cause of action and Common Cause and other appellants in No. 80-847 lack standing to prosecute the subject appeal.*

STATEMENT OF THE CASE

A. Statutory Scheme

Presidential general election campaigns are governed by the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§431-55 (1976 & Supp. III 1979) and the Presidential Campaign Fund Act ("Fund Act"), 26 U.S.C. §§9001-9013 (1976 & Supp. III 1979).[1] The Fund Act provides for the public funding of general presidential and vice-presidential election campaigns through the Presidential Election Campaign Fund which is financed by a voluntary taxpayer check-off system. Presidential and vice presidential candidates of a political party who satisfy the requirements of 26 U.S.C. §9003 can elect to receive payments from the Fund to defray campaign expenses incurred by the candidates or their authorized committees. 26 U.S.C. §9012(c); *see* 26 U.S.C.

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*In addition to the parties named in the caption, the other parties to the proceedings below were David Cohen, Winifred Long, Carl T. Curtis, Americans for an Effective Presidency, and Fund for a Conservative Majority. The alignment of the parties is set forth at pages 3-6. The American Civil Liberties Union and the Southeastern Legal Foundation filed briefs *amicus curiae* in support of defendants AFC, Fund for a Conservative Majority and Americans for an Effective Presidency.

[1]Except as otherwise noted, all citations relating to FECA will be to the current version, as amended, and to 2 U.S.C. All citations to the Fund Act will be to the current version, as amended, and to 26 U.S.C.

§9002(11) (definition of qualified campaign expense). The FEC has exclusive jurisdiction over enforcement of the Fund Act. 2 U.S.C. §437c(b)(1).

Section 9012(f) of the Fund Act, which the three-judge district court found unconstitutional,[2] prohibits unauthorized political committees[3] from making independent expenditures[4] in excess of $1,000 to further the election of the candidates. *FEC v. AFC* at 6a. A political committee which violates §9012(f) is subject to criminal penalties. 26 U.S.C. §9012(f)(3).

Section 9011(b) of the Fund Act authorizes the FEC, the national committee of any political party and individuals eligible to vote for President to institute actions "as may be appropriate to implement or construe" provisions of the Fund Act. Actions which are appropriate under §9011(b) are adjudicated by three-judge district courts on an expedited basis. 26 U.S.C. §9011(b).

B. The Proceedings Below

Appellee AFC is a political committee registered with the FEC pursuant to 2 U.S.C. §433.[5] Appellees Ameri-

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[2] FEC v. Americans for Change, Nos. 80-1609 & 80-1754, at 1a (D.D.C. Sept. 30, 1980) (three-judge court) [hereinafter cited as *FEC v. AFC* with page citations to Appendix of Common Cause].

[3] The Fund Act does not define an "unauthorized committee." The Federal Election Commission ("FEC") has specified that "[a]n 'unauthorized committee' is a political committee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate." 11 C.F.R. §100.5(f)(2) (1980). All political committees subject to federal campaign financing laws are either "authorized" or "unauthorized." *Id.*

[4] "Independent expenditures" is defined at 2 U.S.C. §431(17) and by the FEC in its regulations at 11 C.F.R. §109.1(a) (1980).

[5] Harrison H. Schmitt and Carl T. Curtis are the Chairman and Treasurer, respectively, of AFC.

cans for an Effective Presidency ("AEP") and Fund for A Conservative Majority ("FCM") are also political committees. *FEC v. AFC* at 3a. During the presidential election campaign, AFC raised money by means of limited contributions from individuals and other political committees in accordance with FECA, 2 U.S.C. §441a. *Id.* AFC made independent expenditures in support of candidates for federal offices during the 1980 general election campaign including independent expenditures in support of Ronald Reagan and George Bush, the Republican candidates for the offices of President and Vice President. *Id.* at 3a-4a.

On July 1, 1980 Common Cause, David Cohen and Winifred Long (hereinafter collectively referred to as "Common Cause") sued AFC seeking an order declaring that AFC violated 26 U.S.C. §9012(f) and enjoining defendants from making expenditures in support of Ronald Reagan's candidacy.[6]

On July 15, 1980 the FEC moved to intervene in the Common Cause action and filed a separate complaint against AFC and two other political committees, AEP and FCM. The FEC complaint sought a declaration that §9012(f) prohibited expenditures, including independent expenditures, in excess of $1,000 by unauthorized political committees in support of a candidate who

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[6]Count I of Common Cause's complaint alleged that AFC's activities, even if independent of the official Reagan campaign, violated §9012(f). Count II alleged that AFC was not independent of the official Reagan campaign and, as a result, its expenditures were contributions to the official Reagan campaign in violation of the Fund Act. Common Cause did not appeal the judgment of the three-judge court that the court lacked subject matter jurisdiction over Count II. Jurisdictional Statement, Common Cause v. Schmitt, at 10 n. 15.

financed his campaign under the Fund Act. Common Cause moved to intervene as party plaintiff in the FEC action and to consolidate both cases.[7]

The FEC intervened in the Common Cause action and, along with AFC, moved for dismissal on the ground that the three-judge court lacked subject matter jurisdiction. AFC and the FEC opposed Common Cause's motion to intervene in the FEC action.

AFC, along with AEP and FCM, moved for summary judgment in the FEC action. AFC argued that §9012(f) could be saved from constitutional infirmity by construing it to permit independent expenditures but to prohibit political committees from making expenditures requested or authorized by the candidate or his committees. Alternatively, AFC, along with AEP and FCM, argued that §9012(f) is unconstitutional under the First Amendment.

On August 28, 1980 the three-judge court granted judgment for appellees in the FEC action, dismissed Count I of Common Cause's amended complaint on the basis of the ruling in the FEC action and dismissed Count II for lack of subject matter jurisdiction. FEC's motion for summary judgment was denied. Common Cause's motion to intervene in the FEC action and to consolidate the cases was denied as were all other motions pending in the Common Cause action.

On September 24, 1980 the three-judge district court ordered the cases consolidated. The opinion of the court was issued on September 30, 1980. The court decided that §9012(f) is unconstitutional under the First Amend-

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[7]Common Cause amended its complaint to add AEP and FCM as defendants.

ment and the decisions of this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980). *See FEC v. AFC* at 14a-24a.

Both the FEC and Common Cause noticed appeals. Common Cause filed its jurisdictional statement on November 25, 1980. It asked this Court to reverse summarily the ruling below and remand Count I for further development of the factual record or, alternatively, to grant full briefing on the merits. The FEC's jurisdictional statement asks the Court to note jurisdiction in this appeal, receive briefs on the merits and hear oral argument.

ARGUMENT

I.

THE THREE-JUDGE COURT CORRECTLY CONCLUDED THAT SECTION 9012(f) IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

The three-judge court held that 26 U.S.C. §9012(f) prohibits "*all* expenditures over $1,000 by political committees which further a presidential candidate's election." *FEC v. AFC* at 7a. Such a limitation on expenditures not coordinated with the candidate or his authorized campaign committees constitutes an unconstitutional abridgement of the freedoms of speech and association guaranteed by the First Amendment. *Id.* at 24a. The judgment below, which is based on and mandated by this Court's decisions in *Buckley v. Valeo*[8] and *Republican National Committee v. Federal Election*

[8] 424 U.S. 1 (1976).

Commission,[9] is correct as a matter of law. This Court should grant appellee AFC's motion to affirm.

Limitations on political expenditures affect core First Amendment rights of political expression and association and must be subject to exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *FEC v. AFC* at 10a. This Court has already held that a $1,000 limit on independent political expenditures by individuals or groups cannot withstand such scrutiny. *Buckley, supra*, 424 U.S. at 51; *Republican National Committee, supra*, 487 F. Supp. at 286. The FEC in effect seeks to relitigate and overturn a principle of constitutional law that was settled by *Buckley* and reaffirmed by *Republican National Committee.*

A limit on uncoordinated "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate[10] for federal office"[11] is unconstitutional. *Buckley, supra*, 424 U.S. at 44, 51. Such a limitation is unconstitutional as applied to any "person,"[12] including a committee or an association. *Id.* at 39-40 n.45; *FEC v. AFC* at 12a. This Court has rejected every governmental interest advanced in support of limits on independent political expression. *Buckley, supra*, 424 U.S. at 44-51; *FEC v. AFC* at 11a; *see ACLU*

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[9] 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980).

[10] "Candidate" is an individual who seeks nomination for election, or re-election to federal office. 2 U.S.C. §431(2).

[11] "Federal office" includes the offices of President and Vice President. 2 U.S.C. §431(3).

[12] "Person" includes "an individual, partnership, committee, *association*, corporation, or any other organization or group of persons." 2 U.S.C. §431(11) (emphasis added).

v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975).

The FEC argues that expenditures by political committees pose "the risk that presidential candidates may become, or even appear to be, beholden to these private benefactors." Jurisdictional Statement, *FEC v. AFC*, at 13. While expenditures made in coordination with the candidate raise the possibility of a corrupt *quid pro quo* arrangement and are therefore limited, *Buckley, supra*, 424 U.S. at 46; *FEC v. AFC* at 19a, the independent expenditure limits at issue here "redress only tangentially the corruption problem" and cannot be imposed in a manner consistent with the First Amendment. *Id.* at 11a (citing *Buckley, supra*, 424 U.S. at 45). An uncoordinated expenditure can damage a political campaign and is often not welcome by the candidate, reducing significantly the likelihood of an implicit *quid pro quo*. *Buckley, supra*, 424 U.S. at 45-46.

The FEC asserts that the unconstitutionality of §9012(f) somehow undermines the legality of public funding itself. *See* Jurisdictional Statement, *FEC v. AFC*, at 3-8. As the court below recognized, however, "the restrictions associated with public funding (*e.g.*, no private contributions, expenditure ceilings, etc.) are permissible only because the rights of supporters are left untouched." *FEC v. AFC* at 13a (citing *Republican National Committee, supra*, 487 F. Supp. at 286). In addition, the legislative history makes clear that "[w]hile independent expenditures pose a difficult question, it should be emphasized that *the need to control them does not arise from public financing.*" S. Rep. No. 93-689, 93d Cong., 2d Sess. 18, *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 114 (1977) (emphasis in original).

The First Amendment guarantees the right of citizens "to associate with others for the common advancement of political beliefs and ideas." *Buckley, supra,* 424 U.S. at 15 (citing *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975)). As this Court has noted:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and *collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign.

Budkley, supra, 424 U.S. at 57 (emphasis added). This Court has "emphasized that free expression may not be limited on the basis of the 'identity of its source, whether corporation, *association*, union or individual.' " *FEC v. AFC* at 21a (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

The First Amendment protects politically effective associations.[13] "Effective advocacy of both public and

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[13]The FEC incorrectly confuses independent *expenditures by* political committees with individual *contributions to* political committees. *See* Jurisdictional Statement, FEC v. AFC, at 26-27. The latter are limited under 2 U.S.C. §441a(a)(1)(C) and are not at issue in this case. *See* California Medical Ass'n v. FEC, No. 79-4426 (9th Cir. May 23, 1980), *review pending*, 49 U.S.L.W. 3207 (U.S. Oct. 7, 1980) (No. 79-1952). Section 9012(f) restricts independent expenditures by political committees which are fully protected by the First Amendment. Buckley, *supra*, 424 U.S. at 44-45; FEC v. AFC at 12a. The FEC contends that independent expenditures by political committees are entitled to little First Amendment

[footnote continued]

private points of view, particularly controversial ones, is undeniably enhanced by group association." *Buckley, supra,* 424 U.S. at 15 (citing *NAACP v. Alabama,* 357 U.S. 449, 460 (1958)). As the court below noted, "political committees pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message." *FEC v. AFC* at 16a. In *Buckley* this Court struck down the $1,000 limit on independent expenditures because a limitation on independent political expression

> precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of freedom of association. . . . *[C]onstraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents."*

424 U.S. at 22-23 (citations omitted) (emphasis added).[14] For identical reasons, the three-judge court held that the

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protection because "political professionals" are entrusted with responsibility for making these expenditures on behalf of individual contributors. Jurisdictional Statement, FEC v. AFC, at 13. Political committees, even those operated by "political professionals," are entitled to no less First Amendment protection than wealthy individuals, who have a constitutional right to make unlimited expenditures on behalf of presidential candidates. *See* FEC v. AFC at 22a; Buckley, *supra,* 424 U.S. at 49. In fact, if §9012(f) "were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force." FEC v. AFC at 22a.

[14]This Court specifically envisioned the formation and operation under the campaign financing laws of "well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." Buckley, *supra,* 424 U.S. at 26 n. 26. Moreover,

[footnote continued]

constraints in §9012(f) must be struck down as unconstitutional. This Court should affirm the judgment of the court below.

II.

THE COURT SHOULD AFFIRM THE JUDGMENT OF THE THREE-JUDGE COURT DISMISSING THE COMPLAINT OF COMMON CAUSE, OR ALTERNATIVELY, DISMISS THE APPEAL OF COMMON CAUSE

The three-judge court correctly concluded that §9012(f) is unconstitutional and its dismissal of the complaint of Common Cause in No. 80-847 should be affirmed. In the alternative, the Court should find that §9011(b) does not authorize Common Cause's complaint or that Common Cause lacks standing to bring such a claim or pursue this appeal.[15]

A. Section 9011(b) Does Not Authorize Common Cause's Complaint.

Count I of Common Cause's complaint seeks a declaration that AFC and other political committees violated §9012(f), a criminal statute, by making independent expenditures in support of President Reagan's candidacy. Count I further requests the Court to enjoin AFC from violating the Fund Act. Common Cause, a

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contributors remain free to become "member[s] of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22. Political associations simultaneously were left free "to aggregate large sums of money to promote effective advocacy." *Id.*

[15]The court below found that it lacked subject matter jurisdiction under §9011(b) over Count II of Common Cause's complaint. FEC v. AFC at 26a. The court acknowledged that the issue of whether §9011(b) authorized Count I remained unresolved. FEC v. AFC at 25a.

private entity, is suing other private parties to enjoin allegedly criminal activities under the Fund Act. As a result, Common Cause is seeking civil enforcement of the Fund Act.

Congress has provided the FEC with exclusive jurisdiction over civil enforcement of the federal election laws, including the Fund Act.[16] *FEC v. AFC* at 25a-26a. The FEC moved to dismiss Counts I and II on the basis that Common Cause was "bring[ing] an enforcement action in the guise of a suit to implement or construe the statute." *FEC v. AFC* at 28a n.54. While the court below did not reach the issue in relation to Count I, it recognized that "the FEC's enforcement jurisdiction has recently been vindicated," and claims of "violations of the election laws must first be brought before the FEC as within that agency's exclusive jurisdiction." *FEC v. AFC* at 28a-29a.[17] Count I, like Count II, is within the exclusive jurisdiction of the FEC.

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[16] 2 U.S.C. §437c(b)(1) ("The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.")

[17] FECA provides a carefully drafted statutory scheme by which a private person can obtain such enforcement. 2 U.S.C. §437g. Section 437g(a) directs that any person who believes a violation of the Fund Act has occurred may file a complaint with the FEC. The FEC must then notify the respondent, investigate the complaint, determine whether a violation has occurred and attempt to obtain a conciliation agreement. *Id.* §437g(a)(2)-(5). Throughout the investigative and conciliation stages, the respondent is entitled to confidential treatment of all information and proceedings. *Id.* §437g(a)(12). If an agreement cannot be obtained, the FEC may seek injunctive and other relief in federal district court. *Id.* §437g(a)(6). If the FEC dismisses or fails to act on a complaint, the complainant may file an action in federal district court. *Id.* §437g(a)(8). The district court may direct the FEC to reinstitute the complaint and proceedings under §437g.

Section 9011(b) provides that the FEC, the "national committee of any political party and individuals eligible to vote for President are authorized to institute such actions . . . as may be appropriate to implement or construe any provisions" of the Fund Act.[18] The statute does not expressly provide that one private party has the right to sue another private party to enjoin alleged violations of the Fund Act. Any inference of a private cause of action not expressly authorized by a statute "must be consistent with the evident legislative intent and of course, with the effectuation of the purposes intended to be served by the [statute]." *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 418 (1975) (quoting *Passenger Corp. v. Passengers Association*, 414 U.S. 453, 457-58 (1974)).

The legislative history of the Fund Act and FECA, in conjunction with the purposes of both statutes, demonstrates that §9011(b) should not be read to create a right on the part of one private party to sue another private party to remedy alleged Fund Act violations.

In 1971, when the Fund Act was passed, the FEC did not exist. There was no agency with the duty or requisite powers to enforce administratively the federal election laws.[19] However, in 1974 Congress created the FEC and gave it primary jurisdiction over civil enforcement of

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[18]Since the organization Common Cause is not one of the entities listed in §9011(b), it does not have standing in any event to proceed under §9011(b).

[19]The Department of Justice could use its general prosecutorial powers to prosecute actions in district court for violations of the Fund Act. It had and has no authority to conduct administrative proceedings under the Fund Act.

FECA. Pub. L. No. 93-443, §310, 88 Stat. 1280 (1974). In reconstituting the FEC after *Buckley*, Congress in 1976 amended the FEC's primary jurisdiction to make it exclusive; this exclusive jurisdiction encompassed civil enforcement of the Fund Act. FECA Amendments of 1976, Pub. L. No. 94-283, §101, 90 Stat. 476 (1976).[20]

FECA's mechanism for enforcement of private complaints ensures that the federal election laws cannot be

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[20]The House report stated:

> *In addition to centralizing civil enforcement authority in the Commission, the bill takes one additional step to limit unjustifiable litigation burdens that might otherwise be imposed on the courts and on individuals against whom a complaint has been filed.*
>
> * * * * *
>
> The phrase *"exclusive primary jurisdiction" used to describe the congressional intent to centralize the civil enforcement of the Act in the Federal Election Commission* is taken from the Supreme Court's decisions in *San Diego Unions v. Garmon*, 359 U.S. 236. There the Court recognized that Congress, in enacting the National Labor Relations Act, "entrusted administration of the labor policy for the nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." (Garmon, 359 U.S. at 242). On that basis the Court stated that all complaints bottomed on an alleged violation of the NLRA are within that Agency's "exclusive competence" (*id.* at 245) and that all other tribunals must therefore "yield to the primary jurisdiction of the National Board" (*id.*) *The Court's ruling in Garmon captures the essence not only of the NLRA's administrative scheme, but of this Act's enforcement procedures as well.*

H.R. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 804 (1977) (emphasis added). The Conference Committee expressly adopted the House Report's position. H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 35 (1976), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 995 (1977).

used to harass and intimidate individuals and associations from the exercise of fundamental First Amendment rights through "unjustifiable litigation burdens." H.R. Rep. No. 917, 94th Cong., 2d Sess. 4 (1976), *reprinted in* Legislative History of Federal Election Campaign Act Amendments of 1974, at 801 (1977). It also ensures that the FEC, which is constituted to be politically balanced, has primary and exclusive jurisdiction to formulate policy with regard to federal election laws.[21]

The only parties to invoke successfully jurisdiction of a three-judge court under §9011(b) have done so in suits *against the FEC* or its predecessors in order to challenge the constitutionality of provisions of the Fund Act. *See Buckley v. Valeo*, 519 F.2d 817, 819 (D.C. Cir. 1975), *aff'd in part & rev'd in part*, 424 U.S. 1 (1976); *Clark v. Valeo*, 559 F.2d 642, 646 n. 3 (D.C. Cir.) (*en banc*), *aff'd sub nom. Clark v. Kimmit*, 431 U.S. 950 (1977); *Republican National Committee v. Federal Election Commission*, 461 F. Supp. 570, 576 (S.D.N.Y. 1978) (opinion accompanying order convening three-judge court), *aff'd*, 616 F.2d 1 (2d Cir. 1980) (*en banc*), *aff'd*, 445 U.S. 955 (1980). Questions appropriately certified to a three-judge court are constitutional questions and cases of special public interest. *FEC v. AFC* at 27a; *see Republican National Committee, supra*, 461 F. Supp. at 576; *Buckley v. Valeo, supra*, 519 F.2d at 818-19. Common Cause's request to remand Count I for discovery demonstrates that Count I, like Count II, "raises complicated questions of fact and difficult questions of election law policy which are without the scope of 'implement or construe,' " *FEC v. AFC* at 26a.

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[21] *See In re* Carter-Mondale Reelection Comm., Inc., [1980] Fed. Elec. Camp. Fin. Guide (CCH) ¶9132, at 51,036-37 (D.C. Cir. Sept. 12, 1980).

Section 9011(b) does not authorize Count I. If the Court does not affirm the judgment below, it should nevertheless dismiss the appeal of Common Cause.[22]

B. Common Cause Lacks The Requisite Article III Characteristics To Press Its Claim Or Bring This Appeal.

In order for Common Cause to invoke the Court's jurisdiction under §9011(b) it must have alleged "such a personal stake in the outcome of a controversy so as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1977) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *Buckley, supra*, 424 U.S. at 11. This "personal stake" requires " 'a distinct and palpable injury' to the plaintiff, *Warth v. Seldin*, 422 U.S. 490, 501 (1975)," *id.*, and "a fairly traceable connection between the injury alleged and the conduct at issue," *id.* Common Cause must demonstrate a "substantial likelihood that the judicial relief" it is requesting "will prevent [its] claimed injury." *Id.* at 79.[23]

The injuries claimed to be suffered by Common Cause are: (1) injury to their right as voters to have the election

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[22]See *Cort v. Ash*, 422 U.S. 66 (1975), where shortly after the creation of the FEC this Court held that 18 U.S.C. §610, now codified at 2 U.S.C. §441b, did not create a private cause of action. 422 U.S. at 76. In so holding, the Court recognized that FECA had vested the FEC with jurisdiction over private enforcement of the federal election laws. *Id.* at 74-76.

[23]The court below acknowledged that the issue of whether Common Cause possessed the requisite Article III requirements remained unresolved. FEC v. AFC at 25a.

process and federal funding scheme function in accordance with the law; (2) dilution of their votes through inducement of more votes for President Reagan; and (3) undue influence on elected officials which would impair Common Cause's effectiveness at lobbying. *See* Appendices to the Jurisdictional Statement, *Common Cause v. Schmitt*, at 82a.

The first interest is no more than a "mere interest in the problem" and is not sufficient to give Common Cause a direct stake in the outcome of this action. *See Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). As to the second and third alleged injuries, it is mere speculation as to whether the Court's decision in this litigation would strengthen the votes of the individual appellants or preserve the effectiveness of Common Cause's lobbying.

Common Cause is asking the Court to redress injuries that results from acts of third parties, *i.e.*, other voters, not before the Court and events which have not and may never happen, *i.e.*, loss of lobbying influence. Speculative inferences are necessary to connect the claimed injuries to the actions of appellees. The alleged injuries do not suggest a substantial likelihood that victory would preserve Common Cause's lobbying effectiveness or preserve the strength of appellants' votes. As such, it is not "injury that fairly can be traced to the challenged action," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1975); *see Duke Power Co., supra*, 438 U.S. at 58, or injury which is "distinct and palpable," *id.*

Common Cause lacks the requisite standing under Article III of the Constitution to press its claim under Count I.

CONCLUSION

For the foregoing reasons, appellees Americans for Change, Harrison H. Schmitt, and Carl T. Curtis move that the judgments in Nos. 80-847 & 80-1067 be affirmed, or alternatively, that the appeal in No. 80-847 be dismissed.

Respectfully submitted,

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